Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 1068. 119

THOMAS J. CASEY, TRUSTEE,
PETITIONER,
v.
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of Facts.

On October 5, 1942, the District Court ordered that, not later than December 15, 1942, there be a statement of the proposed plan for reorganization filed with the clerk (Record, page 3).

On December 15, 1942, the District Court extended the time for filing the debtor's plan for reorganization to not later than March 15, 1943 (Record, page 3).

On March 12, 1943, the District Court extended the time for filing the debtor's plan for reorganization to not later than April 15, 1943 (Record, page 4).

On April 12, 1943, a document entitled "Debtor's Plan of Reorganization" was filed with the clerk (Record, pages 4 to 7).

On June 29, 1943, the respondent filed a motion to dismiss the proceedings for reorganization or, in the alternative, to adjudge the debtor a bankrupt (Record, page 7), which motion was denied (Record, page 8). Upon appeal to the Circuit Court of Appeals said order was vacated and the case remanded to the District Court for further proceedings not inconsistent with the opinion (Record, page 29).

The Circuit Court's reasons for vacating the order appear in the opinion, but may be summarized as follows:

1. No proper plan was filed within the time specified.
2. The plan was not a proper plan under Chapter 10.
3. The reorganization of the debtor corporation was either impossible or unnecessary and no reasons were shown for further continuation of the proceedings.

Many of the facts discussed in the Court's opinion were to be found in the records of the two prior appeals in this case, which are not in the record accompanying the petition for certiorari. Without the complete record, no proper determination of the merit or lack of merit of the plan or the Circuit Court's decision can be made.

The Summary Statement of Matter Involved (Record, pages 2 and 3) in the Trustee's Petition for Certiorari contains certain inaccurate statements of matters omitted from the record filed with the petition.

From the omitted records it can be ascertained that the taking by the United States was of a portion only of the mortgaged premises, not the whole thereof, as may be inferred from the Summary Statement. The statements that

the petitioner has, at all times, been ready to pay the mortgage arrears out of the condemnation moneys, that assets of the debtor exceed its liabilities, and that there is cash available to pay the respondent all payments due upon its mortgage to date and to pay the claims of unsecured creditors in full are all matters which are open to dispute and are to be determined in future proceedings.

In the second appeal in these proceedings (139 Fed. (2d) 207) the Circuit Court held: "The mortgagee's lien attaches to the rents as they are collected and to the compensation paid by the United States for use and occupancy of the premises . . . such security interest may not be impaired by any distribution by the trustee of the funds in his hands to junior creditors or by any other disposition of the funds of no benefit to the mortgaged property."

From the omitted records it appears that the only funds in any substantial amount are the rents (in the hands of the trustee) and the condemnation fund. The statement that funds are available for the payment of unsecured creditors ignores the opinion of the Circuit Court.

Argument.

Of the reasons stated in Rule No. 38 for granting a review on writ of certiorari, the petitioner attempts to bring his writ within only one of the several reasons stated, and that one is that the Circuit Court has decided an important question of federal law which has not been but should be settled by this Court. As a matter of fact, it is not clearly indicated by specific words that that reason is the one applicable to the present case. It can only be inferred by process of elimination; none of the others are even suggested.

The petition states as reason for granting the writ that it has been the practice of District Courts throughout the United States to approve plans for reorganization of corporations having secured creditors under Chapter 10 where the plan makes no provision for adjustment of the security, but provides solely for composition, payment or extension of the unsecured claims. He asserts that this has been the practice of the District Courts, yet he cites no cases and offers no example where this has been done. A practice so widespread as he suggests to be a "universal rule" should at least be supported by one or more examples thereof.

The only case cited which may suggest such a practice is *In re Johnson Steel & Iron Company*, 47 F. Supp. 652, which was a case arising under Section 77b, but disposed of after the Chandler Act, amending the Bankruptcy Act by making Chapters 10 and 11 thereof mutually exclusive. The Chandler Act was designed to prevent such practice in this regard as may have existed under the provisions of Section 77b. In that case the effect of the provisions making Chapters 10 and 11 mutually exclusive were not discussed, and the plan was rejected for other reasons. It is certainly inconclusive authority for the proposition that such a practice exists or is proper.

The facilities available for the purpose of obtaining delay under the more complicated proceedings provided by Chapter 10 are far greater than under Chapter 11. The proceedings under Chapter 10 were designed to take care of complicated situations involving the adjustment or marshaling of claims among divers classes of secured and unsecured creditors. The proceedings under Chapter 11, however, afford very little opportunity for delay and are designed to speedily take care of situations where adjustment of unsecured debts only is desired and no adjustment of claims of secured creditors is to be effected.

The very purpose of separating the provisions of Chapter 10 and Chapter 11 and the sections making them mutually exclusive, 11 U.S.C. secs. 501 and 701, would be defeated if both classes of cases were allowed to proceed under Chapter 10.

The petitioner argues as a First Point in his brief that the Court, once having obtained jurisdiction under Chapter 10, cannot be ousted by events which happened subsequently to the filing of the petition. His point is unsupported by authorities and his argument would seem to be contrary to the express provisions of the Act. It appears clear that if, during the proceedings, events occur subsequently to the filing of the petition, which make it impossible or unnecessary to effect a reorganization, the proceedings should be dismissed and the parties allowed to pursue other remedies. The Circuit Court in its opinion has pointed out the possibility of amending to comply with provisions of Chapter 11. Section 147 of the Bankruptcy Act specifically provides for such an amendment, and after such an amendment is allowed that proceedings shall thereafter proceed as if originally filed under Chapter 11. If the purpose of continuing the proceedings under Chapter 10 is not to avail themselves of the greater facilities for delay, it may be pertinent to inquire why the trustee or the debtor does not avail himself of Section 147 of the Bankruptcy Act.

Point Two of the petitioner's brief is merely an assertion unsupported by argument, demonstration or authority. The fact that the plan filed contemplated the payment in full of all arrears due on secured debts, and that the continuance of the secured obligations be assumed by the debtor, adds or detracts nothing to or from what any plan filed under the provisions of Chapter 11 must of necessity contemplate.

The argument of the petitioner in Point Three may have been applicable under the provisions of Section 77b but is

no longer applicable under the new Act (U.S.C. tit. 11, c. 10, secs. 501, 547 and 701).

But the defect in the petitioner's position is even more fundamental than the procedural aspects. The trustee blandly assumes that he has in his hands funds sufficient to liquidate in full the arrears on the claims of the secured creditors, and funds in prospect sufficient to pay the unsecured creditors in full. The plan proposed (Record, page 4 *et seq.*) is based upon that assumption and the assumption that the funds which the trustee has in his hands may be treated as general assets, if not in whole, at least in part. In a prior appeal, 139 Fed. (2d) 207, it was established that the respondent here had a lien upon the rents and the condemnation moneys. The trustee has admitted that unless he can use part of the condemnation funds to pay the unsecured creditors it will be impossible to work out any plan of reorganization (Record, page 27). If he can use a part of these funds as general assets, reorganization under Chapter 10 is obviously unnecessary.

The Circuit Court has recognized that with respect to the condemnation fund a question of marshaling may arise, but since that question was not properly raised on this appeal and since it was not argued before them, they have made no decision on it. The question of marshaling which will arise is suggested and clearly indicated by the record of the two prior appeals. The respondent here has a lien on two funds, the condemnation moneys and the rent moneys, and in addition has a first mortgage on the real estate and on the personal property. There exist second and third mortgagees who have rights in the condemnation fund by virtue of their mortgages on the real estate but do not have liens upon the rent moneys or the personal property. If the rules of marshaling applicable in the reorganization proceedings require the first mortgagee to first apply the rent moneys in payment of the arrears on its

mortgage before any application is made of the condemnation fund and the condemnation fund is applied upon the mortgage, no funds are available to effect a reorganization.

That such is the probable result is indicated by—

General Laws of Massachusetts, c. 79, sec. 33.

8 C.J.S. page 1345, sec. 467.

38 C.J.S. page 1365 *et seq.*

Broadway National Bank v. *Hayward*, 285 Mass. 459.

James Stewart & Co., Inc., v. *National Shawmut Bank*, 291 Mass. 534.

Bates v. *Boston Elevated Railway Co.*, 187 Mass. 328.

It has now become clear that the proceedings should have been dismissed at the beginning on the theory of *Marine Harbor Properties Inc.* v. *Manufacturers Trust Co.*, 62 S. Ct. 93.

Chapter 10 was not and is not the appropriate proceeding. The interests of all parties will best be served by other available proceedings.

From the omitted portion of the records it can be ascertained that there has never been any finding that the value of the premises exceeds the amount of the mortgages thereon; only a finding that the rental expected from the United States, together with rents derived from such tenants as have been allowed to remain on the premises, will be adequate to satisfy the terms of the mortgages and leave a surplus over and above such requirements that may be used for the satisfaction of other creditors.

That this finding was based in part upon an error of law became evident upon the second appeal, wherein it appeared that the District Court was of the opinion that the injunctions which were the subject-matter of the first ap-

peal "would be of no practical value" unless the rents "became a part of the general assets in the trustee's hands for the purposes of reorganization" (3931, Record, page 6). The original error has now resulted in a situation where the continuation of it makes a cure impossible. If we are to save the patient, some other remedy is indicated. As it stands now, the parties are restrained from seeking the appropriate remedy; obviously Chapter 10 was not designed or intended to cure all ills.

Fidelity Assurance Assoc. v. *Sims*, 318 U.S. 608.

The proceedings under Chapter 10 should be dismissed so as to permit the accomplishment of the following relief:

First: The rents should be first applied to the payment of the arrears on the first mortgage.

Second: The personal property should be sold and applied on the first mortgage.

Third: The condemnation moneys should be applied on the mortgage in appropriate proceedings.

Fourth: If it is desired to preserve the property for future use of the debtor, effort should be made to refinance it. Failing in such effort, the real estate should be sold either in bankruptcy proceedings or by mortgage foreclosure proceedings.

The reorganization proceedings, with their attendant orders, depriving the mortgagee of its possession, permitting the trustee to collect the rents on leases assigned to the mortgagee, restraining sale, and withholding application of the condemnation fund, have created a situation where the assets are being wasted by the accumulation of interest charges, taxes, storage charges, insurance and expenses of administration, without benefit to anyone,

except to permit two stockholders (Record, page 10), without risk to or contribution from them, to speculate on a possible increase in real-estate values, while creditors must suffer the risks of loss incident to further delay.

Since under the laws of the Commonwealth of Massachusetts damages by way of interest upon unpaid interest may not be recovered in any eventuality by the respondent first mortgagee, it has suffered irreparable loss, which loss is increasing as arrears accumulate during the pendency of the reorganization proceedings.

In conclusion, it is submitted that the petition for writ of certiorari should be denied for the following reasons:

1. The Circuit Court of Appeals was not in error.
2. The petition does not show proper cause within the provisions of Rule 38.
3. The petitioner seeks to bring before the Court only a fragment of the case and record.
4. The present inequitable situation should be speedily terminated.

Respectfully submitted,

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